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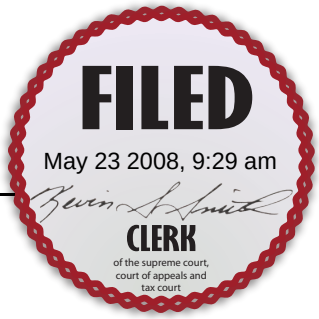

IN THE
COURT OF APPEALS OF INDIANA

CLINTON W. YOUNG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0711-CR-527
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0612-FB-59

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Clinton W. Young appeals his conviction for class C felony attempted robbery and the finding that he is a habitual offender, as well as alleged scrivener's errors in the judgment of conviction and abstract of judgment regarding his sentence for class B misdemeanor battery. We affirm Young's attempted robbery conviction and habitual offender finding and remand for correction of the judgment of conviction and abstract of judgment.

Issues

We restate Young's issues as follows:

I. Whether sufficient evidence supports his attempted robbery conviction;

II. Whether the trial court committed reversible error in admitting evidence regarding his prior habitual offender finding;

III. Whether a jury instruction given prior to deliberations in the habitual offender proceeding constitutes fundamental error; and

IV. Whether he is entitled to the correction of alleged scrivener's errors in the judgment of conviction and abstract of judgment.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that shortly before 3:30 a.m. on October 23, 2006, Young entered a convenience store in Elkhart, walked up and down several aisles, and approached the counter with a granola bar. He gave money to cashier Wendy Tweedy. When Tweedy opened the cash register to give Young change, he hit her in the chest. Tweedy stumbled backwards and closed the cash register drawer. Young leaned over the counter and unsuccessfully attempted to open the register drawer. He opened a

drawer underneath the register, but it did not contain money. Tweedy dialed 911. Young walked out of the store, mounted a bicycle, and rode off.

Tweedy informed the 911 operator of the attempted robbery and described the perpetrator as a black male "wearing a black skull cap, a black jacket or coat, blue or green work pants with newer looking black and white tennis shoes." Tr. at 243. Tweedy told the operator that the man had jumped on a bicycle and headed south on Main Street. Sergeant David Baskins received a dispatch regarding the attempted robbery and the suspect and drove toward the convenience store in his patrol car. Shortly after receiving the dispatch, Sergeant Baskins saw Young, who matched the suspect's description, cycling southbound on Main Street. Sergeant Baskins followed the bicycle and activated his lights and siren. Young looked back, kept pedaling, and unsuccessfully attempted to maneuver between several houses. Eventually, Sergeant Baskins and another officer apprehended Young, whose clothing was collected as evidence. At approximately 7:30 that morning, a detective took a statement from Tweedy and showed her a photo lineup that included Young's photo. Tweedy could not identify any of the men as the perpetrator.

The State charged Young with class B felony robbery resulting in bodily injury, class A misdemeanor battery, class A misdemeanor resisting law enforcement, and being a habitual offender. At the jury trial on July 24, 2007, Tweedy identified Young as the man who had attempted to rob the convenience store, stating that she was "one hundred percent certain" of her identification. *Id*. at 311. Tweedy identified Young's confiscated clothing as that worn by the perpetrator and also identified Young as the man who appeared in a surveillance videotape of the attempted robbery. The jury found Young guilty of the lesser-

included offenses of class C felony attempted robbery and class B misdemeanor battery and of class A misdemeanor resisting law enforcement. The jury also found Young to be a habitual offender.

On August 23, 2007, the trial court sentenced Young to concurrent terms of eight years for attempted robbery, six months for battery, and one year for resisting law enforcement. The court imposed a twelve-year habitual offender enhancement on Young's attempted robbery sentence, for an aggregate sentence of twenty years. Young now appeals.

Discussion and Decision

I. Sufficiency of Evidence for Attempted Robbery Conviction

Young's only basis for challenging the sufficiency of the evidence supporting his attempted robbery conviction is Tweedy's inability to identify him in the photo lineup. Young's argument is a blatant request to reweigh the evidence in his favor, which we may not do. *See Gleaves v. State*, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) ("[I]nconsistencies in identification testimony impact only the weight of that testimony, because it is the jury's task to weigh the evidence and determine the credibility of the witnesses. As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict.") (citations omitted). The evidence and inferences that support the verdict, including Tweedy's in-court identification of Young and his confiscated clothing, are more than sufficient to sustain Young's attempted robbery conviction.

II. Admission of Prior Habitual Offender Finding

To convict Young of being a habitual offender, the State was required to prove that he had accumulated two prior unrelated felony convictions. Ind. Code § 35-50-2-8. During the habitual offender phase of the proceedings, the State offered into evidence Exhibit 12, which contained details regarding two of Young's prior felony convictions as well as references to a prior habitual offender finding. The trial court admitted Exhibit 12 over Young's objection that it was irrelevant and prejudicial.

On appeal, Young contends that the trial court committed reversible error in admitting Exhibit 12, yet he simultaneously concedes that "[t]he State had ample proof of the two prior felony convictions without introducing evidence of [his] prior status as an habitual offender." Appellant's Br. at 13.[1] As our supreme court concluded in *Kalady v. State*, "[s]ince there was clear and probative proof of at least two prior unrelated felony convictions, any additional convictions were mere surplusage and the requirement of the habitual criminal statute was fulfilled." 462 N.E.2d 1299, 1305 (Ind. 1984). In other words, any error in the admission of Exhibit 12 can only be considered harmless.

[1] For the first time on appeal, Young cites Indiana Evidence Rule 404(b), which provides in pertinent part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident …." Contrary to Young's suggestion, there is no indication that Exhibit 12 was offered to prove anything other than the fact that he had accumulated two prior felony convictions.

III. Habitual Offender Instruction

At the close of evidence in the habitual offender proceeding, the court instructed the jury in pertinent part as follows:

> *If you should fail to reach a decision, this case will be left open and undecided. Like all cases, it must be disposed of at some time. Another trial would be a heavy burden on both sides. There is not reason to believe that the case can be tried any better or more exhaustively than it has been. There is not reason to believe that more evidence or clearer evidence would be produced on behalf of either side. There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial, or more reasonable than you. Any future jury must be selected in the same manner that you were.* This does not mean those favoring a particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of the other jurors or because of the importance of arriving at a decision. This means that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

Tr. at 412 (emphasis added).

On appeal, Young takes issue with the italicized portion of the instruction, to which he failed to object at trial. Young acknowledges that failure to object to an instruction typically results in waiver of the issue, *Brown v. State*, 691 N.E.2d 438, 444 (Ind. 1998), but he attempts to avoid waiver by characterizing the instruction as fundamental error. Our supreme court has explained that "[t]he 'fundamental error' rule is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002).

Young claims that the italicized portion of the instruction is an impermissible *Allen* charge, which is "given to urge an apparently deadlocked jury to reach a verdict. Such *additional* instructions are closely scrutinized to ensure that the court did not coerce the jury into reaching a verdict that is not truly unanimous." *Hero v. State*, 765 N.E.2d 599, 604 (Ind. Ct. App. 2002) (citation omitted) (emphasis added), *trans. denied*. In *Broadus v. State*, while not condoning the giving of such an instruction, our supreme court held that the giving of such an instruction *prior* to deliberations in that case was harmless error. 487 N.E.2d 1298, 1303-04 (Ind. 1986).

Young contends that the instruction was not harmless in this case "given the prejudice that ensued following the admission of [Exhibit 12], which showed [he] had already been determined to be an Habitual Criminal Offender …." Appellant's Br. at 17. Given our determination that any error in the admission of Exhibit 12 was harmless, we find no fundamental error in the giving of the jury instruction.

IV. Correction of Scrivener's Errors

Finally, Young contends, and the State concedes, that the judgment of conviction and abstract of judgment incorrectly indicate that he was sentenced to one year for class B misdemeanor battery. We remand with instructions to correct those documents to reflect a six-month sentence for class B misdemeanor battery.

Affirmed and remanded.

BARNES, J., and BRADFORD, J., concur.